

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD  
REGION 8

MID-WEST TELEPHONE SERVICE, INC.

and

CASE 8-CA-38901

WILFREDO PLACERES, AN INDIVIDUAL

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MID-WEST TELEPHONE SERVICE, INC.

and

CASE 8-CA-39168

DUSTIN PORTER, AN INDIVIDUAL

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MID-WEST TELEPHONE SERVICE, INC.

and

CASES 8-CA-39297  
8-CA-39388

BEN FANNIN, AN INDIVIDUAL

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MID-WEST TELEPHONE SERVICE, INC.

and

CASE 8-CA-39334

MIKE WILLIAMS, AN INDIVIDUAL

**RESPONDENT MIDWEST TELEPHONE SERVICES, INC.'S BRIEF IN OPPOSITION  
TO COUNSEL FOR THE ACTING GENERAL COUNSEL'S MOTION TO DISMISS  
RESPONDENT'S APPLICATION FOR ATTORNEY FEES UNDER  
THE EQUAL ACCESS TO JUSTICE ACT**

As a result of a negotiated settlement agreement, Wilfredo Placeres repeatedly requested permission to withdraw the unfair labor practice charge (the "Charge") he filed against Midwest Telephone Services, Inc. ("Midwest"). Counsel for the Acting General Counsel, Melanie Bordelois, and her supervisor, agreed that withdrawal was appropriate and promised to recommend that the Charge be allowed to be withdrawn. Regardless, for some unspecified

reason, the Regional Director refused to honor Mr. Placeres' withdrawal request and the parties negotiated settlement. Fortunately, Judge Caramissi recognized that Mr. Placeres was being forced to pursue the Charge against his will and potentially to his detriment. Thus, he issued an Order permitting the Charge to be withdrawn.

Because judicial intervention was required to resolve the Charge and enforce the settlement agreement between the parties, and because the Regional Director was not substantially justified in pursuing the Charge over Mr. Placeres' objections, Midwest is entitled to the attorneys' fees and costs it incurred in defending against the Charge. Such fees and costs were completely described in Midwest's EAJA application.

**I. RESPONDENT WAS A PREVAILING PARTY UNDER BUCKHANNON BECAUSE JUDICIAL INTERVENTION WAS REQUIRED TO COMPEL WITHDRAWING OF THE CHARGE AND ENFORCEMENT OF THE PARTIES' SETTLEMENT AGREEMENT.**

The Acting General Counsel's argument that an EAJA applicant is not a "prevailing party" where a Region voluntarily withdraws a complaint pursuant to a settlement agreement may or may not be correct, but it is not applicable here.<sup>1</sup> Unquestionably, the Region did not voluntarily withdraw Mr. Placeres' Charge.

Here, the Acting General Counsel and the Respondent entered into a settlement agreement relating to the Placeres' Charge. Pursuant to that agreement, Respondent agreed to reinstate Mr. Placeres and release him from a non-compete agreement. In exchange, the Acting General Counsel agreed to dismiss the Charge.

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<sup>1</sup> In the past, the Board has treated EAJA applicants as the prevailing party even in situations where complaint allegations were voluntarily withdrawn by the General Counsel prior to a decision by an ALJ or the Board. See, *Shrewsbury Motors*, 281 NLRB 486, 487-488 (1986).

Respondent fulfilled its obligations under the agreement and reinstated Mr. Placeres without a non-compete. The Acting General Counsel, however, refused to fulfill her obligations, despite the repeated requests of Wilfredo Placeres and despite the fact (as recognized by Judge Carissimi) that her refusal put Mr. Placeres' reinstatement in jeopardy.<sup>2</sup> Instead, the Acting General Counsel forced Respondent to defend itself against the Charge until Judge Carissimi ordered that it be dismissed.

In arguing that the prevailing party test is driven by an applicant's "success" on the merits, the Acting General Counsel completely ignores the United States Supreme Court's holding in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health and Human Resources*. (2001) 532 U.S. 598. In *Buchannon* the Supreme Court held that a party is a "prevailing party" if applicant has achieved a judicially-sanctioned "materially alteration of the legal relationship of the parties." The disposition of the Placeres' dismissal charge and enforcement of the parties' settlement agreement is exactly the type of judicially sanctioned "material alteration of the legal relationship of the parties" contemplated by *Buchannon*. Thus, Midwest is unquestionably a prevailing party.

**II. THE REGION WAS NOT SUBSTANTIALLY JUSTIFIED IN COUNTINUING TO PURSUE LITIGATION IN VIOLATION OF A SETTLEMENT AGREEMENT AND DESPITE WILFREDO PLACERES' REPEATED DEMANDS THAT THE CHARGE BE WITHDRAWN.**

The Acting General Counsel has not met her burden to prove that the stubborn refusal to honor Wilfred Placeres' withdrawal requests and the parties' settlement agreement was

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<sup>2</sup> Mr. Placeres testified at the hearing that he would like the Charge to be dismissed and that he liked working for Respondent.

substantially justified. *David Allen Co.*, 335 NLRB 783, 784-785 (burden on federal government to establish that its position was “substantially justified”).

No reasonable basis exists for the decision to continue the litigation in light of the settlement agreement between the parties in the face of Mr. Placeres’ protests. Indeed, Counsel for the Acting General Counsel, Melanie Bordelois (and her supervisor) seemingly conceded this fact as early as July 11, 2011 when she stated in an e-mail to Midwest Attorney John Ross that: “**My supervisor and I are prepared to recommend to the Regional Director that Wilfredo’s withdrawal request be approved** once he gets the letter.”<sup>3</sup> (See, July 11, 2011 E-mail from Melanie Bordelois to Attorney John Ross, attached hereto as **Exhibit A**)(emphasis added). For unexplained reasons, however, the litigation continued, even though Midwest honored every term of the parties’ agreement. This is unreasonable conduct under any standard.

The continuation of litigation becomes even more confusing in light of Mr. Placeres’ own **repeated and unambiguous** requests that the Charge be withdrawn. The requests include the following:

- A July 13, 2011 letter to Attorney Bordelois. (attached as **Exhibit C**). Mr. Placeres specifically indicated he “decided to decline the amount of money asked by the National Labor Relation [sic] Board.”
- A July 26, 2011 Internet Form NLRB-601 Withdrawal Request signed by Mr. Placeres. (attached as **Exhibit D**). This request was rejected by the Regional Director despite Attorney Bordelois’ statement that she and her supervisor would recommend that it be accepted; and

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<sup>3</sup> The “letter” referenced to by Attorney Bordelois was delivered to Mr. Placeres on April 8, 2011. A copy of that letter is attached hereto as **Exhibit B**.

- A passionate September 28, 2011 letter (attached as **Exhibit E**) from Mr. Placeres where he angrily implored that he be permitted to withdraw his Charge. He clearly stated that he wished “to discontinue the case against MTS.” In fact, he was completely bewildered as to why the case was charging along like a freight train despite his multiple written and verbal protests. The helpless feeling Mr. Placeres had at the federal government’s disregard for his wishes was captured by his statement that: **“Honestly, I do not see where this country’s freedom is.”**

Despite Mr. Placeres’ pleas, the federal government continued to pursue Mr. Placeres’ Charge against his will. In his own words, it made him feel, “real bad” that the Regional Director refused to withdraw his Charge. (Transcript at pg. 118). He clearly understood what he was doing and was given advice and support by Attorney Bordelois, who acted as his *de facto* attorney. He made the decision to withdraw his Charge without coercion and that decision was not respected. (Tr. 144).

Further, at trial, Mr. Placeres admitted on direct testimony taken by Attorney Bordelois that, because his “English is very, very, minimum,” it was “possible that [he] could have misunderstood [Bryan Singleton].” (Tr. 100, 114). Thus, it is clear that **Mr. Placeres himself did not feel his case was substantially justified.**

Despite the settlement agreement between the parties, and despite Mr. Placeres’ own wishes and admissions, the Charge was not withdrawn and the trial proceeded until dismissed by judicial intervention. No reasonable person could believe that the Counsel for the Acting General Counsel was substantially justified under such circumstances.

### III. LACK OF SERVICE ON THE CHARGING PARTIES DOES NOT WARRANT DISMISSAL.

Section 102.148 of the Board's rules provides that "the [EAJA] application shall be served on the Regional Director and all parties to the adversary adjudication **in the same manner as other pleadings in the proceeding.**" The "same manner" all other pleadings were served on Wilfredo Placeres, Ben Fannin, Mike Williams and Dustin Porter (the "Charging Parties) in the proceeding was through service on their *de facto* counsel, Attorney Bordelois. Thus, in accordance with Section 102.148, this "same manner" was utilized by Midwest to serve the EAJA application (i.e., by service on Counsel for the Acting General Counsel). Midwest, therefore, properly served the EAJA Application and Counsel for the Acting General Counsel's claims to the contrary are without merit.

Assuming that the Charging Parties should have been personally served at their homes, however, this was accomplished on November 19, 2012. And, late service is not a ground for dismissal of the EAJA application. *Hendrick Co., Inc.* 296 NLRB 75, 76 (1989) citing, *Monark Boat Co.*, 262 NLRB 994 (1982)(service on the charging party is not jurisdictional). Rather, the Board has made it clear that "unless and until the matter at issue has been adjudicated, any potential prejudice [resulting from the failure of service] may normally be remedied by offering the unserved party an opportunity to state its position." *Id*; *Our Way Inc.*, 244 NLRB 236 (1979). Thus, if any Charging Party would like to file a brief, the party could simply be provided additional time to do so.

#### **IV. MIDWEST ITEMIZED ITS FEES AND COSTS AS REQUIRED BY THE EAJA.**

The method used by undersigned counsel in calculating its fees and costs is the method endorsed by the United States Supreme Court in *Hensley v. Eckedent* for cases where a party prevails in only part of its case. 461 U.S. 424; *The Brandeis School v. NLRB*, 871 F.2d 5 (2<sup>nd</sup> Cir. 1989).

In *Hensley*, the court stated that the “most critical factor is the degree of success obtained.” In applying this standard, the court in *The Brandeis School* found that an award of 50% of the applicant’s fees was justified because the partial claim the applicant prevailed on was substantial and “the claims were inter-related and the attorney work on one likely overlapped with the others.” *The Brandeis School, supra*.

Here, as in *The Brandeis School*, the work performed by undersigned counsel substantially overlapped. The four Charging Parties’ cases (a total of five charges) were tried as one matter and involved very similar facts and issues. Thus, the fees requested in Midwest’s EAJA application both specifically related to the Placeres Charge and the charges filed by the other Charging Parties. Because only the Counsel for the Acting General Counsel’s pursuit of the Placeres’ Charge was substantially unjustified, an award equal to one-fourth of the fees paid by Midwest is reasonable.

#### **V. CONCLUSION.**

Counsel for the Acting General Counsel’s Motion to Dismiss should be denied because:

1. Midwest was a prevailing party because the enforcement of the parties’ Settlement Agreement and the withdrawal of the Charge was judicially compelled and sanctioned;

2. The Acting General Counsel was not substantially justified in her refusal to withdraw the Charge because no reasonable doubt existed that Mr. Placeres did not want to continue to pursue the matter; the parties settled the Charge with the supervision and assistance of Attorney Bordelois; Mr. Placeres admitted he may have misunderstood Mr. Singleton (which completely undermined the factual basis of the Charge); there was no evidence of fraud or coercion; and Midwest had no history of violations of the Act.

3. No prejudice has resulted from the Charging Parties not being served with a copy of the Application at the same time it as served to Counsel for the Acting General Counsel; and

4. Midwest has properly stated the amount of fees and costs for which it is entitled to for reimbursement.

Respectfully Submitted,

MORROW & MEYER, LLC.

/s/Hans A. Nilges  
Hans A. Nilges  
6269 Frank Ave., NW  
North Canton, OH 44720  
(330) 433-6000 Telephone  
(330) 433-6993 Facsimile  
E-mail: hnilges@morrowmeyer.com

Counsel for Respondent  
Mid-West Telephone Services



## CERTIFICATE OF SERVICE

I hereby certify that a copy of the Respondent Midwest Telephone Services, Inc.'s Brief in Opposition to Counsel for the Acting General Counsel's Motion to Dismiss Respondent's Application for Attorney Fees Under the Equal Access to Justice Act was sent this 6<sup>th</sup> day of December, 2012 to the following via electronic mail:

Melanie Bordelois, Esq.  
National Labor Relations Board, Region 8  
1240 E. 9<sup>th</sup> St, Room 1695  
Cleveland, OH 44199-2086  
Email: Melanie.Bordelois@nrlb.gov

By U.S. Mail:

Wilfredo Placeres  
604 Whipple Avenue  
Campbell, Ohio 44405

Dustin Porter  
1076 Tod Avenue N.W.  
Warren, Ohio 44485

Ben Fannin  
1101 South Street  
Niles, Ohio 44446

Mike Williams  
562 Stanton Avenue  
Niles, Ohio 44446

/s/Hans A. Nilges

Hans A. Nilges

## FW: 07-07-2011(2).pdf

From: **John Ross** (jross@morrowmeyer.com)  
Sent: Wed 10/12/11 8:36 AM  
To: smdraher@hotmail.com (smdraher@hotmail.com)

### John C. Ross

Partner Attorney

#### Morrow & Meyer LLC

*Attorneys at Law*

6269 Frank Ave NW

North Canton, OH 44720

Phone: (330) 433-6000

Fax: (330) 433-6993

E-mail: jross@morrowmeyer.com

Website: [www.morrowmeyer.com](http://www.morrowmeyer.com)

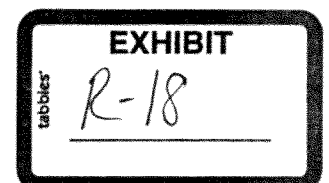
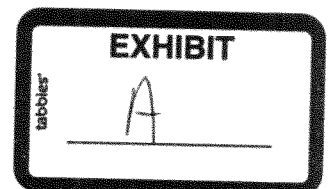
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**From:** Bordelois, Melanie R. [mailto:Melanie.Bordelois@nlrb.gov]  
**Sent:** Monday, July 11, 2011 10:25 AM  
**To:** John Ross  
**Subject:** RE: 07-07-2011(2).pdf



John:

I just got off the phone with Wilfredo and he told me that he was requesting withdrawal of his charge, conditioned on the receipt of the new letter we discussed this morning. So, if you want to move this along even quicker, you could scan the new letter from MWT, which I will then email to Wilfredo. My supervisor and I are prepared to recommend to the Regional Director that Wilfredo's withdrawal request be approved once he gets the letter.

I'll wait to hear from you,

Melanie R. Bordelois

Field Attorney

National Labor Relations Board – Region 8

1240 East Ninth Street, Room 1695

Cleveland, OH 44199-2086

(216) 522-3740

(216) 522-2418 fax

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**From:** John Ross [mailto:jross@morrowmeyer.com]

**Sent:** Friday, July 08, 2011 8:42 AM

**To:** Bordelois, Melanie R.

**Subject:** 07-07-2011(2).pdf

Melanie, Mid - West sent the attached to Mr. Placeres. Also enclosed is our Answer. – John.



MID-WEST TELEPHONE SERVICE, INC.

P.O. BOX 151 • GIRARD, OH 44420

330-530-0409 • 330-530-0413 Fax

April 8, 2011

Mr. Wilfredo Placeres

604 Whipple Ave.

Campbell, OH 44405

RE: Return to Employment

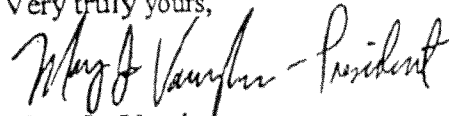
Dear Wilfredo:

We wish to welcome you back to your employment with Mid-West Telephone Service, Inc. Hopefully, any misunderstands between you and the company are behind us, and we will have a good relationship going forward.

This is to confirm that, as we agreed, you are not bound by any "non-competition" or a "covenant not to compete" relating to your employment with MWTS.

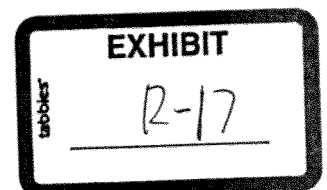
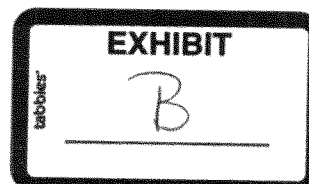
This understanding and agreement is confidential and only between you and the company and should not be disclosed to any third party.

Very truly yours,

  
Mary Jo Vaughn,

President

MJV/av



RECEIVED  
NLRB  
REGIONAL

JUL 18 A 9:26

LEVELAL

604 Whipple Avenue  
Campbell, Ohio 44405

July 13, 2011

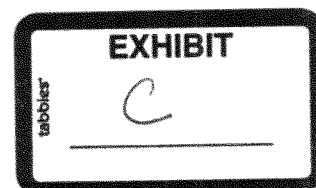
National Labor Relation Board  
1240 East 9<sup>th</sup> Street  
Cleveland, Ohio 44199

To Whom It May Concern:

I, Wilfredo Placeres work for Midwest Telephone Company and I am writing in order to inform you that I have decided to decline the amount of money asked by the National Labor Relation Board. Instead, I am going to continue working without any other compensation. Thank you.

Sincerely,

Wilfredo Placeres



ALJ 1

UNITED STATES OF AMERICA  
NATIONAL LABOR RELATIONS BOARD

WITHDRAWAL REQUEST

Mid-West Telephone Service, Inc.  
and Wilfredo Placeres

8-CA-38901

In the matter of \_\_\_\_\_  
(Name of case) (Number of case)

This is to request withdrawal of the (petition) (charge) in the above case.

Wilfredo Placeres

(Name of Party Filing)

Withdrawal request approved

By Wilfredo Placeres  
(Name of Representative)

(Date)

(Title)

\_\_\_\_\_  
Regional Director,  
National Labor Relations Board.

Date 7-26-11  
U.S. GPO 2000-464-841/29073

EXHIBIT

D

EXHIBIT

R-3

MRB  
Wilfredo Placeres  
604 Whipple Avenue  
Campbell, Ohio 44405

September 28, 2011

USA National Labor Relations Board  
Region 8  
1240 East Ninth Street  
Room 1695  
Cleveland, Ohio 44199

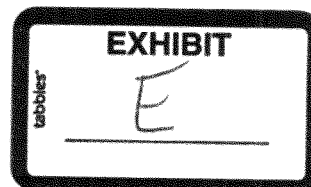
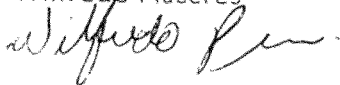
To Whom It May Concern:

I, Wilfredo Placeres, work for Midwest Telephone Service (MTS). I spoke to Melanie Bordelois, and requested to discontinue the case against MTS. The reason for this is because I am very happy to once again work at MTS. Unfortunately, as an American citizen, I feel compelled to participate in a trial of which I no longer wish to be a part of and in a free country such as the United States where I currently reside, I ask to waive all charges against MTS. Honestly, I do not see where this country's freedom is.

Thank you.

Sincerely,

Wilfredo Placeres



ALJ 2